Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-1085

KATHRYN LUMPKIN,
Petitioner,

VS.

CITY OF LITTLE ROCK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

R. JACK MAGRUDER III
Little Rock City Attorney
400 W. Markham
Little Rock, Arkansas

BY: ROBERT T. TAYLOR

Attorney for Respondent

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 8

CASES CITED

Page

Boddie v. Connecticut, 401 U.S. 371 (1971) 5

Hunt v. Pan American Energy, Inc., 540 F.2d 894 (8th Cir. 1976) 6

Katsev v. Coleman, 530 F.2d 176 (8th Cir. 1976) 6

Mid-Continent Petroleum v. Keen, 157 F.2d 310 (8th Cir. 1946) 6

Monell v. New York City Dept. of Social Services, _____U.S._____, 98 S.Ct. 2018 (1978) 5

Walters, et al. v. City of St. Louis, Missouri,
347 U.S. 231 (1954) 7

Werner v. United States Dept. of Interior,
581 F.2d 168 (8th Cir. 1978) 6

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OPINION BELOW

The opinion delivered in the Court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on October 17, 1979.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Petitioner's issue is not the issue presented to the Trial Court nor is it the issue dealt with by the Court of Appeals. The issue decided by each of those Courts was whether Arkansas law barred tort actions against Arkansas cities at the time the Petitioner's alleged cause of action arose in 1958. As such, Petitioners issue does not encompass a federal question requiring this Court's scrutiny.

STATEMENT OF THE CASE

This action was filed in the U.S. District Court, Eastern District of Arkansas, Western Division, on November 30, 1976. The Petitioner alleged that in 1958, she had been burned by smudge-pots placed on or about her property during the Respondent's work on a nearby street. The Petitioner further charged that the City of Little Rock, through its agents and employees, could be sued under theories of negligence and strict liability. The Respondent City moved to dismiss pursuant to Rule 12 (b) contending that Arkansas law was one of sovereign immunity. The Petitioner, in a reply brief, countered that in 1958 Arkansas did not embrace the law of sovereign immunity and that had the Arkansas Supreme Court decided the matter at that time it would have so held.

The District Court disagreed, finding that the law in Arkansas in 1958 was clearly one of sovereign immunity and dismissed the Petitioner's claim. The Petitioner appealed, and in a *per curiam* opinion the Court of Appeals upheld the District Court's findings.

ARGUMENT

The Petitioner's streamlined, and somewhat simplified, presentation of the question in this matter does not fully or accurately present the issue as it developed before the Court of Appeals. At the trial level, the Petitioner argued that this case should turn on how the Arkansas Supreme Court would have decided this case twenty years earlier. In committing to this tack, the Petitioner necessarily stipulated that Arkansas law did, indeed, apply in this instance. When the Trial Court decided adversely to the Petitioner, an appeal ensued with the Petitioner charging, *inter alia*, that the law under which relief was sought violated the Fourteenth Amendment of the Constitution, and that it further violated her fundamental right of access to the courts.

Now, before this Court, the Petitioner's characterization of the issue takes this matter even further from the original question the Trial Court was asked to decide. Indeed, a comparison of the issue framed for the Trial Court by the Petitioner (Brief in Support of Response to Motion to Dismiss, at page 2), with the Petitioner's current statement of the issue reveals what appears to be two completely separated and distinct lawsuits.

The aberration of the issue took place, of course, at the Court of Appeals where the Petitioner first sought to have the questions of equal protection and access to the Court considered.

At that point, the Respondent contended that such arguments, raised for the first time on appeal, could not be considered. The Petitioner then charged that the arguments had been raised (and presumably explored) at the trial level by virtue of a one sentence statement contained in a trial brief. Specifically, on page seven of an eight page argument, the Petitioner had stated, almost as an afterthought, or to tie together loose ends, that the law also " . . . violated the equal protection and due process clauses of the U.S. Constitution." No particular analysis, explanation, justification, illustration, supportive reasoning, or even bar-room argument was advanced to shed light on this hypothesis. It was simply plugged into the brief like one plugs in an extra wall socket in the event more voltage is needed.

At the appeal level, however, the Petitioner took pain to compare the Arkansas law under attack to a 1974 South Carolina law that apparently separated redress for injuries suffered in motor vehicle accidents from other types of injuries. The thrust of this analysis was that Arkansas law also created classifications which required study. The Petitioner next attempted to demonstrate that a fundamental right of access to the courts existed, and that she had been denied that right.

In support of this latter argument, the Petitioner relied heavily upon language found in *Boddie v. Connecticut*, 401 U.S. 371 (1971). This case, the South Carolina law mentioned above, and the other authorities relied upon on appeal, however, (with the single exception of *Monell v. New York City Dept. of Social Services*, 98 S.Ct. 2018 (1978), mentioned in a letter to the Trial Court) were not submitted until appeal.

The Petitioner's excursion into this territory, then, was clearly taken without the company of the Trial Court and therefore should not now be given *de novo* consideration by this Court. This much is clear from the consistent line of cases holding that issues not presented to the Trial Court cannot find their way into Appeals Courts. In *Katsev v. Coleman*, for example, 530 F.2d 176 (8th Cir. 1976), the Court granted summary judgment to the Appellee based on facts stipulated by both parties. On appeal the Appellant (plaintiff) alleged that there were other facts that it had tried to present as additional evidence to the trial court after entering into stipulations. The trial court had denied this request. On appeal the court refused to consider those matters not addressed by the trial court. Specifically, the court stated that "(t)hat allegation was not considered by the District Court. We have reviewed the *complaint* . . . and find no foundation for the claim . . . *Thus, . . . the claim cannot be asserted on appeal.*" Id. at 180. (Emphasis added) Likewise, the court in *Hunt v. Pan American Energy, Inc.*, 540 F.2d 894 (8th Cir. 1976), in responding to issues raised for the first time on appeal, stated:

> Whether possession by the Ballantynes of Hunt drill hole locations and identification numbers, assuming their use in the purchasing of leases, would support the imposition of a constructive trust under North Dakota law is an issue we need not decide. *The Hunts' complaint* and the trial to the court below *did not encompass this theory. It cannot be asserted for the first time appeal. Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976). (Emphasis added)

This principle was also recognized in *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310 (8th Cir. 1946); and *Werner v. United States Dept. of Interior*, 581 F.2d 168, 181

(8th Cir. 1978). In *Werner*, the court was emphatic in its refusal to hear arguments raised for the first time on appeal:

> Finally, appellants argue that 28 U.S.C. Sec. 1361 (the mandamus statute) and 28 U.S.C. Sec. 1331 (the federal question statute) confer jurisdiction for the equitable relief they seek. These arguments were not made to the district court and will not be considered on appeal. *Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 184 (8th Cir. 1975); *Prairie Band of Pattawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767, 770-71 (10th Cir. 1963).

Finally, in *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954), this Court stated that " . . . we will not undertake to review what the Court below did not decide." What could be more clear or more on point? The issue the Petitioner seeks to thrust upon this Court was not the issue which determined the outcome of this case below and accordingly, it should not determine the outcome of the Petition now before this Court.

CONCLUSION

Based on reasons set forth the Respondent states that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

R. JACK MAGRUDER III
Little Rock City Attorney
400 W. Markham
Little Rock, Arkansas

BY: ROBERT T. TAYLOR

Attorney for Respondent